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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERGIO CAMPOS RAMIREZ, Defendant and Appellant.	B145971 (Super. Ct. No. YA041452)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark D. Arnold, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Robert F. Katz, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sergio Campos Ramirez appeals from the judgment entered following a jury trial that resulted in his convictions for first degree murder (Pen. Code, § 187, subd. (a))[1] and first degree residential robbery (§ 211). The jury also found true the special circumstance allegation that Ramirez committed the murder while engaged in the commission of the robbery (§ 190.2, subd. (a)(17)). The trial court sentenced Ramirez to life in prison without the possibility of parole.

Ramirez contends: (1) the trial court erred by refusing to instruct the jury regarding voluntary intoxication, thereby violating his federal constitutional rights to due process and a jury trial; (2) the trial court erred by instructing the jury with CALJIC No. 17.41.1; and (3) his sentence of life without possibility of parole constitutes cruel and unusual punishment. Finding these contentions lack merit, we affirm.

FACTUAL BACKGROUND

On the afternoon of August 6, 1999, Adolfo De la Torre visited victim Thomas Sawal at Sawal's home. Sawal kept an approximately two foot by two foot safe, weighing between 120 to 130 pounds and containing jewelry, silverware, coins, and papers, in his bedroom. Sawal kept the safe completely covered by an opaque tablecloth. Beneath his mattress, Sawal kept two firearms, a .38 caliber and a .22 caliber. Sawal owned two automobiles, a white Toyota Celica and a Toyota 4-Runner.

Sawal was moving, and had begun packing his belongings. At 5:00 p.m., three of Sawal's friends arrived and the group began drinking beer. Ramirez was not among the

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[1] All further undesignated statutory references are to the Penal Code.

group. De la Torre stayed in the living room, lifting two 15-pound dumbbells. When finished, De la Torre put the dumbbells on the floor in their designated places.

While De la Torre was visiting, Sawal received a telephone call from a Spanish-speaking man. Sawal said, " 'I already told you yes, asshole.' " Sawal spoke jokingly and was smiling. At the preliminary hearing, De la Torre testified that he had heard Sawal invite the caller to his home; however, at trial De la Torre testified that he did not remember hearing such an invitation. De la Torre left the house at approximately 6:30 p.m. When he departed, the other three guests had already left, the Celica was parked in front of the house inside the fence, and the driveway gates were closed.

That evening at approximately 9:00 p.m., Saul Flores was working on his ice cream truck when his acquaintance Ramirez drove up in a sporty white car. Ramirez and Flores spoke for approximately 10 minutes. Ramirez exited the car, holding the car keys and waving a gun contained along with some bullets in a clear plastic bag. Ramirez initially told Flores that he had borrowed the car from a friend, but then admitted he had stolen it. Ramirez stated he had " 'just finished beating up someone with a piece of steel.' " Flores replied, " 'You're crazy.' " Ramirez suggested that the two men go have a drink. He said again, " 'I just beat up someone right now. I messed up some idiot.' " Flores did not believe Ramirez and responded, " 'You're crazy. Why are you doing that?' " Ramirez threatened Flores, " 'If you tell, I'm going to mess you up.' "

Flores was frightened of Ramirez, "Because I saw that he was drunk. I thought that maybe he would do something . . . ." Ramirez "act[ed] like he wanted to vomit." Flores smelled alcohol on Ramirez and believed "he was drunk. He was already crazy."

Ramirez seemed to be "almost falling down." Flores took the gun from Ramirez when Ramirez was not looking. After Flores again declined Ramirez's invitation to go drinking, Ramirez drove away. Flores hid the gun in some shrubs in an alley, and later provided it to police.

Sawal was supposed to visit his sister Rosa Sawal's home at 11:00 a.m. the next morning, August 7, 1999. He did not arrive as planned. She went to his home to investigate at approximately 6:00 p.m. on August 7. She found the driveway gate wide open, the metal security door closed but unlocked, and the front door ajar. Sawal was lying in his bed, naked, in his bedroom. A dumbbell was lying between Sawal's head and his shoulder. Dried blood covered his face and had splattered over the sheets and pillows, all the way to his toes. The bedroom light, living room light, hallway light, and bedroom television were on. There was no evidence of forced entry into the residence, nor was there evidence of blood or anything out of the ordinary in rooms other than the bedroom. The bedroom safe, one of the guns, and the white Toyota Celica were missing.

An autopsy disclosed that Sawal had been hit between four to eight times in the head with "very strong blow[s]," causing multiple skull fractures and death. His injuries were consistent with having been struck by the dumbbell. Sawal's body bore no evidence of defensive wounds and there was no indication of a struggle. Blood spatter patterns and other evidence suggested Sawal had sustained the injuries while lying in bed. The deputy medical examiner concluded death had occurred in the mid to late afternoon of August 7, 1999, the date Sawal's body was discovered.

Ramirez was apprehended by police while driving Sawal's white Celica on August 11, 1999. Ramirez's fingerprints were found on two of three empty beer bottles located on Sawal's living room coffee table; no fingerprints were recovered from the dumbbell. Sawal's telephone answering machine was equipped with a caller identification feature and indicated Ramirez had telephoned Sawal. De la Torre identified the gun given to police by Flores as Sawal's.

DISCUSSION

1. *The trial court did not prejudicially err by refusing to instruct on voluntary intoxication.*

Ramirez requested that the jury be instructed with CALJIC Nos. 4.21, 4.21.1, and 4.22, concerning voluntary intoxication. These instructions would have informed the jury that voluntary intoxication is not generally a defense, but could be considered by the jury in regard to whether the defendant possessed the requisite intent for a specific intent crime.

The trial court declined to give the instructions as requested. It explained: "The evidence seems to be lacking. Assuming Mr. Ramirez was under the influence of alcohol when he came across Saul Flores, there is no evidence that he drank to the extent that he would be under the influence prior to or during the incident involving the victim. It's completely lacking. [¶] He could have done his drinking afterwards. The fact that his fingerprints are on two of the beer bottles that were found in the residence, I don't believe that that's substantial evidence that would put him under the influence to the extent that was testified to by Saul Flores. [¶] It could certainly be argued that there is some

evidence that he had been drinking, and I suppose a jury could find that he might have been under the influence at the time of the beating of Mr. Sawal, however, I don't believe that the threshold that is required . . . has been met." The trial court opined that "it would certainly be fair comment on the evidence presented for him to make the argument to the jury that his ability to form specific intent and/or mental state, was impaired, such that the jury should have a reasonable doubt about that issue, but I don't believe that evidence was presented that rises to the level of the giving of the voluntary intoxication instruction." During closing argument, Ramirez's counsel argued that the jury should consider the evidence Ramirez was intoxicated.

Ramirez urges that the evidence showed he was highly intoxicated during the incident and that his intoxication affected his mental state and his behavior. Thus, he argues, the trial court erred by not instructing the jury as he requested.

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence, (*People v. Lewis* (2001) 25 Cal.4th 610, 645), and a trial court has the duty to instruct accordingly. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 160; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) "[E]vidence of voluntary intoxication is relevant to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue[,]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1119) and instructions regarding intoxication are therefore required to be given upon request when evidence supports the defense theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) A trial court need not, however, give an instruction requested by the defense if substantial evidence does not

support it. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Evidence is substantial if a reasonable jury could find it persuasive. (*People v. Barton* (1995) 12 Cal.4th 186, 201 & fn. 8.) In determining whether substantial evidence exists, we do not examine the credibility of the witnesses. (*People v. Tufunga, supra,* 21 Cal.4th at p. 944.) Doubts as to the sufficiency of the evidence to justify the use of a particular instruction should be resolved in favor of the accused. (*Ibid*.)

Here, there was evidence Ramirez had consumed alcohol. His fingerprints were found on two beer bottles in Sawal's home, from which the jury could have inferred that he consumed two beers the evening of the murder. Flores testified that he smelled alcohol on Ramirez, and Ramirez appeared drunk when the two met at approximately 9:00 p.m. The crimes must have been committed after 6:30 p.m. (when De la Torre left the Sawal residence) and before 9:00 p.m. (when Ramirez encountered Flores). Therefore, given that the evidence showed Ramirez smelled of liquor and appeared drunk at 9:00 p.m., the jury could have reasonably concluded he had consumed alcohol at or near the time of the crimes.

However, the mere fact a defendant used alcohol before the crimes does not amount to substantial evidence warranting instructions on intoxication, absent evidence regarding the effect of the alcohol on the defendant. (Cf. *People v. Avena* (1996) 13 Cal.4th 394, 415 [" 'Normally, merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on [the now abolished] diminished capacity [defense].

[Citations.]' [Citation.]"].) Here, Flores unequivocally stated Ramirez was drunk, suggesting the alcohol had affected Ramirez's behavior. According to Flores, Ramirez appeared ready to vomit, and was "falling down." On the other hand, Ramirez clearly knew what he had done, in that he told Flores he had just beaten someone with a piece of metal. Our review of the record suggests that Flores's statements that Ramirez was "crazy" are ambiguous and appear to primarily reflect Flores's surprise at Ramirez's description of the crimes, rather than Flores's opinions about Ramirez's mental state. Moreover, there was no testimony regarding whether, due to the consumption of alcohol, Ramirez actually lacked the requisite intents. (E.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 395-396 [facts that defendant's speech was "weird," he had a dreamy look and appeared to be in a daze or "spaced out," and victim referred to him as a "crazy man" was not substantial evidence warranting instruction on diminished capacity in absence of evidence defendant had ingested alcohol or drugs, and no expert had testified that mental state was impaired]; *People v. Horton, supra,* 11 Cal.4th at pp. 1119-1120 [evidence that defendant had freebased cocaine day prior to murders did not require intoxication instruction; no evidence was presented regarding effect of cocaine use on actual formation of specified mental states, and evidence indicated crimes were carried out in accord with a prearranged plan and defendant's statements after crime suggested he was fully aware of his actions and intended their fatal consequences].)

However, assuming arguendo that intoxication instructions were required, we find no error. Both the People and Ramirez assert that the purported error must be evaluated under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18. We assume,

without deciding, that *Chapman* applies, and conclude the omission of instructions on intoxication was harmless beyond a reasonable doubt. Evidence of Ramirez's intoxication could have served only to negate his intent to rob or kill. To find Ramirez guilty of robbery, the jury had to find he took the property with "the specific intent [to] permanently . . . deprive [the victim] of the property." (CALJIC No. 9.40.) The evidence Ramirez had the intent to rob was overwhelming. Ramirez took the safe, which was hidden beneath a tablecloth and contained valuable items, as well as a gun that was hidden under the bed. He also took the victim's car. There was no evidence the house was ransacked; instead, the evidence showed a purposeful, well-thought-out robbery that focused only on key, valuable items. Nothing in the evidence would have supported a finding Ramirez did not intend to permanently deprive the victim of the property.

Moreover, Ramirez's actions were purposeful and precise. The evidence showed that Ramirez carried out a very effective surprise attack on Sawal, who was lying defenseless in bed and was unable even to put up a struggle. Ramirez directed repeated, strong blows only to the victim's head. While Ramirez asserts that the attack was so ferocious that "it could only have been committed reflexively by an individual utterly free of normal inhibitions – a person whose judgment was crippled by drink," we disagree. To the contrary, in our view the evidence of a forceful, precision attack so effective that the victim had no opportunity to even attempt to defend himself suggests intentional behavior and coordinated movements inconsistent with an extremely intoxicated state. After the crimes, Ramirez was able to drive and clearly understood and recalled his actions, as evidenced by his comments to Flores. In short, the evidence

overwhelmingly demonstrated Ramirez knew precisely what he was doing and intended to rob and kill Sawal. No reasonable jury could have found Ramirez committed the acts but lacked the requisite intent. The overall circumstances showed a person in control, not a person who lacked the intent to rob or kill. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 396.) Moreover, once the jury found Ramirez killed during a robbery, it would have found him guilty of first degree felony murder, even apart from the evidence he had the intent to kill. (CALJIC No. 8.21.) Thus, it is clear beyond a reasonable doubt that the omission of instructions on intoxication did not affect the verdict adversely to Ramirez.

2. *The trial court did not err by instructing the jury with CALJIC No. 17.41.1.*

The trial court instructed the jury with CALJIC No. 17.41.1, as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Ramirez contends the use of CALJIC No. 17.41.1 infringed upon his right to trial by jury, stifled free and open jury deliberations, and improperly discouraged jury nullification. Ramirez contends instruction with CALJIC No. 17.41.1 amounted to a structural defect in the proceedings, requiring reversal.

Ramirez's claim lacks merit. As our Supreme Court has explained, "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury,

rather than upon the equal application of settled rules of law." (*People v. Williams* (2001) 25 Cal.4th 441, 462, 463.) Nullification can lead to verdicts "based upon bigotry and racism." (*Id.* at p. 462, fn. omitted.) "A nullifying jury is essentially a lawless jury." (*Id.* at p. 463.) While the validity of CALJIC No. 17.41.1 is currently pending before the California Supreme Court,[2] we note that claims nearly identical to Ramirez's have been rejected at the appellate level. (*People v. Brown* (2001) 91 Cal.App.4th 256, 270-271; *People v. Elam* (2001) 91 Cal.App.4th 298, 310-313.) We reject them as well.

Even assuming for the sake of argument that CALJIC No. 17.41.1 should not have been given, and applying the strictest standard of review (*Chapman v. California, supra,* 386 U.S. 18), the error does not require reversal. There was no report of a deadlock or of jury misconduct, demonstrating the majority did not attempt to intimidate minority jurors. There was no indication any juror intended to act contrary to the law, or that CALJIC No. 17.41.1 had any affect on the verdict. On this record, it would be pure speculation to suggest that CALJIC No. 17.41.1 played a part in the outcome of the trial. Accordingly, any error in the instruction must be seen as harmless. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

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[2] E.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, S088909; *People v. Morgan* (2001) 85 Cal.App.4th 34, review granted March 14, 2001, S094101.

3. *Ramirez's sentence does not amount to cruel and unusual punishment.*

Ramirez asserts that his sentence of life in prison without the possibility of parole amounts to cruel and unusual punishment in violation of the California and federal constitutions. We disagree.

A punishment may violate the California Constitution if, "although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) In making this determination, we: (1) examine the nature of the offense and the offender; (2) compare the punishment with that meted out for more serious crimes in California; and (3) compare the punishment with that given for the same offense in other jurisdictions. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825; *In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427.) A punishment may violate the Eighth Amendment to the United States Constitution if it is an "extreme sentence[]" that is " 'grossly disproportionate' to the crime." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (opn. of Kennedy, J.).)

Regarding the first prong, nature of the offense and the offender, we evaluate the totality of the circumstances surrounding the commission of the current offense, including the defendant's motive, manner of commission of the crime, the extent of the defendant's involvement, the consequences of his or her acts, and his or her individual culpability, including factors such as the defendant's age, prior criminality, personal

characteristics, and state of mind. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.)

Here, the offenses were first degree murder and robbery. Ramirez's conduct was egregious. Ramirez brutally attacked an innocent man for financial gain, and then left him to die over the course of the next day. His motive was apparently greed alone. Ramirez's senseless taking of another's life was reprehensible. Imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either the California or federal constitutions. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.) We do not view a term of life in prison without the possibility of parole as disproportionate for these crimes.

Ramirez, however, argues that he was 24 years old at the time of the crimes; he was a first-time offender; his offenses were but "one incident of aberrant behavior"; he was quiet and courteous during the trial; he does not take drugs and was not involved with gangs; he immigrated from Mexico to the United States to escape poverty and improve his economic situation; he had been married for nine years and had a young daughter; he completed secondary school; and he was working as an ice cream vendor at the time of the crimes. These facts, Ramirez suggests, demonstrate that he "did not fit the profile of a heartless criminal" deserving of life imprisonment.

Assuming arguendo that the aforementioned facts are accurate, they nonetheless do not demonstrate that Ramirez's sentence is disproportionate. During his purported "one incident of aberrant behavior," Ramirez took the life of an innocent man for

financial gain. Ramirez's characterization of his life circumstances does nothing to mitigate the violent, heinous nature of his crime. As the trial court explained, "the manner in which death was inflicted was cruel. . . . [I]t [is] a heinous way to kill someone, to bash someone's head in with a 15 pound dumbbell. . . . [I]t is a very cold and cruel way to kill someone especially when they are in their own house."

Ramirez also attempts to compare himself to the defendant in *People v. Dillon* (1983) 34 Cal.3d 441, 482-483, 486, 488. This comparison is inapt. Unlike the *Dillon* defendant, Ramirez was not a minor, nor was there any evidence he was unusually emotionally immature. Moreover, unlike in *Dillon*, no evidence suggested the victim was armed or that Ramirez was responding in panic to a perceived threat. Ramirez's reliance upon *People v. Dillon* is thus misplaced. In sum, we conclude Ramirez's sentence is not unconstitutionally cruel and unusual.[3]

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[3] Ramirez does not argue that his sentence is unconstitutionally cruel or unusual because it is disproportionate in comparison to the punishments for more serious crimes in California or for the same offenses in other jurisdictions. Thus, we do not address the second and third prongs of the *Lynch* analysis here.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.